TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 362.

THE MADISONVILLE TRACTION COMPANY, APPELLANT,

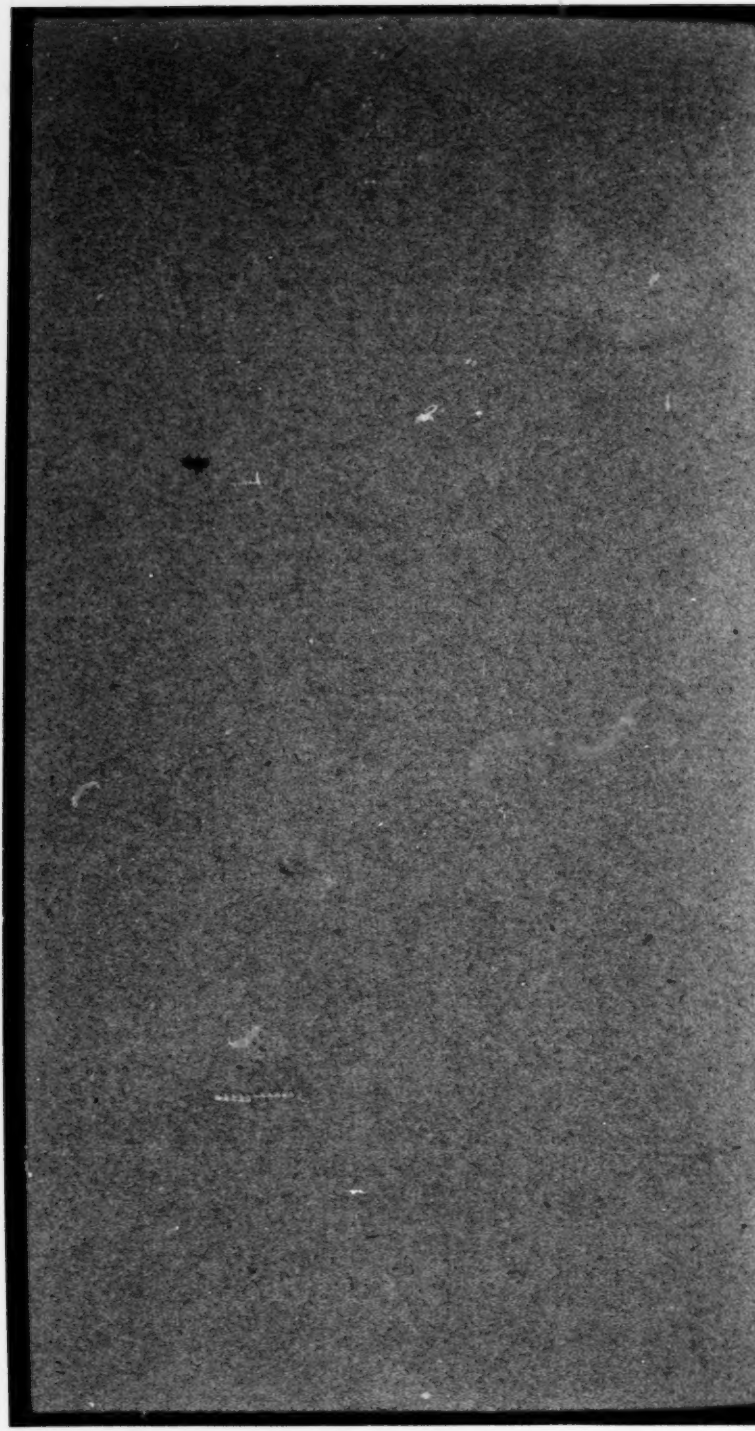
vs.

THE SAINT BERNARD MINING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

FILED SEPTEMBER 1, 1904.

(19,462.)



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1 Proceedings of the circuit court of the United States for the western district of Kentucky, at a regular term begun and held for its May term, at the Federal Court hall, in the city of Owensboro, Monday, May 2, 1904.

Present: Honorable Walter Evans, sitting as circuit judge.

SAINT BERNARD MINING COMPANY
vs.
MADISONVILLE TRACTION COMPANY.

Be it remembered, that heretofore to wit on the 2nd day of January, 1904, came the above named complainant herein by E. G. Sebree its attorney, and filed in the clerk's office of our said court its bill of complaint, against the above named defendant, which said bill of complaint is as follows:—

2 In the Circuit Court of the United States in and for the Western District of Kentucky, Owensboro Division.

THE SAINT BERNARD MINING COMPANY, Plaintiff,
vs.
THE MADISONVILLE TRACTION COMPANY, Defendant.

Bill in Equity.

To the honorable the judges of the circuit court of the United States for the western district of Kentucky:

The Saint Bernard Mining Company a corporation created, organized and existing under and by virtue of the laws of the State of Delaware, and now a citizen and resident of said State, brings this its bill in equity against the Madisonville Traction Company, a corporation created, organized and existing under and by virtue of the laws of the Commonwealth of Kentucky and now a citizen and resident of said Commonwealth,

And thereupon your orator complains and says:—

I.

That heretofore to wit on October 5th, A. D., 1903, the said defendant The Madisonville Traction Company began an action or proceeding against this plaintiff The Saint Bernard Mining Company in the county court in and for Hopkins county, Kentucky, in the name or style of The Madisonville Traction Company, plaintiff against The Saint Bernard Mining Company, defendant, the said plaintiff in said action or proceeding The Madisonville Traction

Company then filing in said court a writing entitled and purporting to be "A particular description of land to be condemned by the Madisonville Traction Company, the same being owned by and the property of the Saint Bernard Mining Company, this day filed in the office of the clerk of the county court for Hopkins county," and also at the same time an "Application to the county court to appoint commissioners to assess damages to the lands of the Saint Bernard Mining Company," from which writings or pleadings so filed it appears and is claimed that the plaintiff The Madisonville Traction Company is a corporation created and existing under and by virtue of the laws of the Commonwealth of Kentucky,
3 and that by virtue of its corporate capacity it is empowered and authorized to construct and maintain a railroad running from Madisonville to Earlington, Hopkins county, Kentucky, and that it — unable to contract with the defendant Saint Bernard Mining Company, the plaintiff in this action, the said company being the owner of land alleged to be necessary for its use as a right of way for the purpose of laying its tracks over and upon which it is necessary to operate its said line of railroad and that the said land necessary for its use for the purpose of right of way is embraced in a strip of ground thirty and fifty feet wide, a particular description of which is alleged in said application to have been filed in the office of the clerk of the county court and to which reference is made in said application and which is asked to be made a part of said application, the said alleged particular description being marked as herein before set out. Said application does further allege that by reason of the fact that the Madisonville Traction Company is unable to contract with the defendant Saint Bernard Mining Company, here plaintiff for land necessary for the use of the Madisonville Traction Company, as a right of way, therefore said land will have to be condemned in order that the said Madisonville Traction Company may enjoy its rights and privileges, as are alleged to be guaranteed to it under the law, and the said application concludes by praying the said court to appoint three commissioners for the purpose of viewing the ground over and upon which said alleged road is proposed to run and to award the Saint Bernard Mining Company, such damages as it must sustain by reason thereof and to report their action in writing to the court. That thereafter on October 16th, 1903, the alleged commissioners appointed by the said Hopkins county court, in response to the aforesaid application, to view the lands therein mentioned and to assess the damages, that the Saint Bernard Mining Company must sustain by reason of the construction of the railroad of the Madisonville Traction Company, filed a written report in the Hopkins county court, in which they state that they have been upon the land of the defendant, describing same substantially in the same way as in the original "particular description" herein above referred to and that they award the Saint Bernard Mining Company $100.00 as damages for the taking of said land and upon filing

of the said report, this plaintiff was summoned by process
4 showed on the application aforesaid and the report of the commissioners aforesaid, to answer in the said Hopkins county court on the second day of November, 1903, that on said date this plaintiff came in the Hopkins county court and filed and exhibited in said court its petition and bond for removal of the said action of The Madisonville Traction Company, plaintiff *vs.* The Saint Bernard Mining Company, defendant, then pending in the said Hopkins county court, into this court and by said petition, did truthfully show to the Hopkins county court that the said action was of a civil nature and that the sum in dispute in said action exceeded the sum of $2000.00 exclusive of interest and costs, and showed that The Saint Bernard Mining Company defendant to said action, was and *tjay* it was at the time of the commencement of the said action and has bee- continuously since December 1901, a corporation, created, organized and existing under and by virtue of the general corporation laws of the State of Delaware, having and maintaining its residence and chief office in the city of Dover, county of Kent, in the said State and that it was a citizen and resident of the State of Delaware and was not a citizen or resident of Kentucky and showed that the plaintiff The Madisonville Traction Company alleged that it was and so far as the Saint Bernard Mining Company was then advised it believed, that the said Madisonville Traction Company was a corporation, duly organized and existing under and by virtue of the laws of the Commonwealth and was a citizen and resident of Kentucky and was not a citizen or resident of the State of Delaware.

That the said petition also showed that the Saint Bernard Mining Company disputed said claim and application and denied any right of the applicant, The Madisonville Traction Company to condemn its land and denied each and every allegation of said application and showed that the said application was deficient and insufficient, both in form and substance, and was not based upon facts and was not brought in good faith; that the said petition was duly subscribed and sworn to according to law by John B. Atkinson president and chief officer of the Saint Bernard Mining Company. That at the same time the Saint Bernard Mining Company presented and tendered a good and sufficient bond, as provided by the statutes in such cases, that the said company on or before the first day of the next
5 ensuing session of the United States circuit court for the western district of Kentucky, Owensboro division, would file therein a transcript of the record in the -aid action and for the payment of all costs which might be adjudged by such court if the said circuit court should hold that the suit was wrongfully or improperly removed thereto. Plaintiff states that it did thereupon move the said Hopkins county court to remove the said action into this honorable court and to stop proceedings of said action in said Hopkins county court, and to approve the said bond, tendered by the Saint Bernard Mining Company, to which motion, the defendant, Madison-

ville Traction Company, objected and the court having considered said motion, it did overrule same and it did refuse to remove the said action into this court and refuse to stop proceedings in the Hopkins county court, in said action, but said Hopkins county court did approve the bond tendered and filed by the Saint Bernard Mining Company. That thereafter to wit on the first day of the regular November term A. D., 1903 in this the honorable circuit court of the United States for the western district of Kentucky, Owensboro division, this plaintiff did bring exhibit and file in this honorable court, then sitting at Owensboro, Kentucky, a duly certified and complete copy and transcript of The Madisonville Traction Company plaintiff, *vs.* The Saint Bernard Mining Company, defendant, in the Hopkins county court. The record in said action or proceeding is on file in the clerk's office of this honorable court, and is hereby expressly referred to and shall be read as part hereof but is not to be copied.

II.

And thereupon your orator complains and says: That disregarding the laws and statutes in this behalf made and provided the said Hopkins county court, acting always at the instance of the defendant, Madisonville Traction Company, and said Madisonville Traction Company since the said record was filed in this honorable court, as aforesaid, is compelling this plaintiff, over its *product*, to proceed, in the said court and will proceed to try and to determine the matters in controversy in said original action or proceeding in the said Hopkins county court, and is about to, and will unless restrained by this honorable court, confirm the said report of the commissioners and take from this plaintiff its said land and allow the said Madisonville Traction Company to enter upon, take possession of
6 and confiscate certain of the lands of the Saint Bernard Mining Company particularly described in the aforesaid writing entitled "Particular description" notwithstanding the removal by operation of law of said action into this court, in which court the said action is now pending, and in disregard of the law and statute in such case made and provided and in contempt of this honorable court.

Plaintiff states that it has a good and valid defence to the said action, and that it disputes said claim and application and denies any right of the Madisonville Traction Company to condemn its lands, and denies each and every allegation of said application and says that the said application is deficient and insufficient both in form and substance and is not based upon facts and is not brought in good faith. That the said report of the commissioners is insufficient in law, and in form, and in substance, and that the alleged commissioners acted improperly, unfairly and unfaithfully in the viewing of its land and in the preparation of their report and in the awarding of damages; that $100.00 is wholly inadequate as compensatio- and appears to have been and was assessed and given under

the influence *and* passion and prejudice or some other illegal motive and that the said land sought to be taken, intrinsically, is worth a great deal more than said amount, and that the incidental damages done to property of plaintiff in the construction of the said road, which damages under the laws of Kentucky, the said commissioners should have taken into consideration and assessed, amount to over $2000.00 and without any consideration or being taken into consideration by the commissioners at all said alleged commissioners in their report, assume to say and report " that the advantages and benefits that will accrue to the adjoining lands through the construction — prudent *and* operation of the railroad proposed to be constructed, will be largely in excess of any damages that will accrue, that in fact they did not believe that any damages will result therefrom." Which statement and allegation is untrue, as plaintiff is prepared to show. Plaintiff says that the damages to its property and business will not be benefitted in the least degree by the construction or prudent operation of said railroad and that it is proposed to deprive it of over 9 acres of its land, which through its location is valued at and is worth over $2500.00 and is so situated that such deprivation will irreparably injure and damage its
7 remaining land. In consideration whereof, and insomuch as your orator is remediless in the premises at and by the strict rules of the common law and is only relievable in a court of equity, where matters of this kind are properly cognizable, and reviewable in so much as said action is being prosecuted in the said Hopkins county court, by the said The Madisonville Traction Company, notwithstanding the removal of the said action by operation of law into this honorable court, and is about to an- will unless restrained by this honorable court, result in serious and irreparable harm and damage to this plaintiff and for which this plaintiff can-ot be adequately compensated at law. To the end therefore that your orator may have that relief which he can only obtain in a court of equity and that this honorable court may protect its jurisdiction and that the said defendant may answer the premises but not upon oath or affirmation to believe whereof the benefit is waived by your orator, does now pray this honorable court that the Madisonville Traction Company be restrained and enjoined from further prosecution of or causing to be prosecuted the action of The Madisonville Traction Company plaintiff *vs.* The Saint Bernard Mining Company defendant, in the Hopkins county court, of Kentucky, and that it be enjoined and restrained from taking any steps or orders, or making any motions and from appearing in the said Hopkins county court in any way in the said action and from taking any proceeding whatever, in the said court in said action and your orator prays that upon hearing, an injunction be granted of the same tenor enjoining and restraining the said defendant from the doing of any such acts and prays for any further relief to which it may appear entitled.

E. G. SEBREE,
Att'y for Pl'ff.

United States District Court for the Western District of Kentucky.

THE SAINT BERNARD MINING COMPANY, Plaintiff,
—
THE MADISONVILLE TRACTION COMPANY, Defendant. } Affidavit.

Affiant, E. G. Sebree ststaes that J. B. Atkinson, the president of the St. Bernard Mining Company is absent from the county of Jefferson and that he the said Sebree is the chief officer of said plaintiff, now in Jefferson county, and he says that the statements made in the foregoing bill are true to the best of his knowledge and belief.

E. G. SEBREE.

Subscribed and sworn to before me this the 6th day of January, A. D., 1904.

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

8 The transcript of the record in the case of Madisonville Traction Co., plaintiff *vs.* St. Bernard Mining Co. defendant, in the Hopkins county court, mentioned in the bill of complaint, is as follows:

In the Hopkins County Court in and for Hopkins County, Kentucky.

MADISONVILLE TRACTION COMPANY, Plaintiff,
vs.
THE SAINT BERNARD MINING COMPANY, Defendant. }

Petition and Bond for Removal Herein.

To the honorable county court in and for Hopkins county, in the Commonwealth of Kentucky:

The petition of The Saint Bernard Mining Company defendant in the above styled cause respectfully shows to this honorable court,

That your petitioner is the defendant in the above styled action and that said action has been commenced against it in your said court by the plaintiff Madisonville Traction Company and that said action is of a civil nature.

That on October 5th, 1903, the said plaintiff came and filed in your said court a writing entitled and purporting to be "A particular description of land to be condemned by the Madisonville Traction Company the same being owned by and the property of the Saint Bernard Coal Mining Company, this day filed in the office of the clerk of the county court for Hopkins county," and also at the same

time an "Application to the county court to appoint commissioners to assess damages to the lands of the St. Bernard Mining Company" in which application it is claimed that the plaintiff Madisonville Traction Company is a corporation created, and existing under and by virtue of the laws of the Commonwealth of Kentucky and that by virtue of its alleged corporate capacity it is empowered and authorized to construct and maintain a railroad running from Madisonville to Earlington, Hopkins county, Kentucky, and that it is unable to contract with the defendant St. Bernard Mining Company, the owner of land alleged to be necessary for its use as a right of way for the purpose of laying its tracks, over and upon which it is necessary to operate its said line of railroad, and that the said land necessary for its use for the purpose of
9 right of way is embraced in a strip of ground thirty and fifty feet wide of a particular description of which is filed in the office of the clerk of the county court, to which reference is made and asked to be made a part of said application, the same being marked as aforesaid. Said application does further allege that by reason of the fact that it is unable to contract with the defendant St. Bernard Mining Company for land necessary for its use as a right of way, therefore same will have to be condemned in order that it may enjoy its rights and privileges as are alleged to be guaranteed to it under the law, and said application concludes by praying this court to appoint three commissioners for the purpose of viewing the ground over and upon which said alleged road is proposed to run, and award defendant such damages as it must sustain by reason thereof and to report their action in writing to the court.

That your petition- disputes said claim and application, and denies any right of the applicant or plaintiff to condemn its lands, and denies each and every allegation of said application, and says that said application is deficient and insufficient both in form and substance and is not based upon facts and is not brought in good faith.

That thereafter on October 16, 1903, the alleged commissioners appointed by the court in response of the aforesaid application to view said land and to assess the damages the St. Bernard Mining Company may be entitled to receive by reason of the land being sought to be condemned filed a written report in this honorable court in which they state that they have been upon the land of the defendant, describing same substantially in the same way as in the original "A particular description, etc." hereinbefore referred to and award the defendant $100.00 as damages for the taking of said land.

Defendant shows to the court that the said report is insufficient in law in form and in substance, and that the alleged commissioners acted improperly and unfaithfully in -he viewing of said lan- and in the preparation of their report, and that the award of damages is grossly inadequate, and appears to have been assessed and given under the influence of passion and prejudice, or some other ille-
10 gal motive, and that the said land is intrinsically worth a great deal more than said amount and that the incidental damages

to its property from the construction of said road which under the law the said commissioners should have taken into consideration and assessed, amount to over two thousand dollars and were not considered or taken into consideration by the commissioners at all. Said alleged commissioners in their sa-d report assume to say and report " that the advantages and benefits that will accrue to the adjacent lands from the construction and prudent operation of the railroad proposed to be constructed will be largely in excess of any damages that will accrue and in fact, they do not believe any damage will result whatever," which statement and allegation is untrue, as the petitioner will in due time show.

Petitioner says that the damage to its propertt and business from the construction and prudent operation of said proposed railroad, will be greatly in excess of two thousand dollars, and that its property and business will not be benefitted in the least degree by the construction or prudent operation of said railroad, and that it is proposed to deprive it of over nine acres of its land, which from its location is valued at over two thousand dollars and is so situated that such deprivation will irreparably injure and damage its remaining lands.

That the matter in dispute in this action exceeds the sum of two thousand dollars, exclusive of interest and costs.

That the defendant The Saint Bernard Mining Company is and at the time of the commencement of the proceeding herein was as its has been continuously since December 1901 a corporation created, organized and existing under and by virtue of the general corporation laws of the State of Delaware, having and maintaining its residence and chief office in the city of Dover county of Kent in staid State, and that it is a citizen of the State of Delaware and is not a citizen of Kentucky.

That the plaintiff The Madisonville Traction Company alleges that it is, and so far as defendant is now advised, it believes that it is a corporation duly organized, and existing under and by virtue of the general corporation laws of the Commonwealth of Kentucky, and is a citizen of Kentucky and is not a citizen or resident of the State of Delaware.

11 Petitioner would further show that it has been summoned by process issued on the application aforesaid and the report of the commissioners aforesaid, to answer herein on the second day of November, A. D., 1903, and that it has until said day to plead or answer and show cause herein and it now comes on said day and brings this its petition.

Wherefore, the premises being considered your petitioner presents a good and sufficient bond as provided by the statute in such cases that they will on or before the first day of the next ensuing session of the United States circuit court, for the western district of Kentucky, Owensboro division file therein a transcript of the record of this action and for the payment of all costs *wjocj* may be awarded

by such court, if the said circuit court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this court proceed no further herein except to make the order of removal as required by law and to accept the bond presented herewith and direct a transcript of the record herein to be made for said court as provided by law and as in duty bound your petitioner will ever pray.

ST. BERNARD MINING CO.,
By JNO. B. ATKINSON, *President.*

—— ——, *Attorney.*

COMMONWEALTH OF KENTUCKY, }
County of Hopkins, } *ss:*

The affiant, John B. Atkinson, being first duly sworn according to law, deposes and says I am the president and chief officer of The Saint Bernard Mining Company, defendant in this action. I have read the foregoing petition and the allegations thereof are true to the best of my knowledge, information and belief.

JNO. B. ATKINSON.

[SEAL.] Subscribed and sworn to before me by Jno. B. Atkinson by me personally known to be the same, on this the 28th day of October, A. D., 1903.

JESSE PHILLIPS,
Notary Public, Hopkins County, Kentucky.

12 Hopkins County Court.

MADISONVILLE TRACTION COMPANY, Plaintiff, }
vs.
THE SAINT BERNARD MINING COMPANY, Defendant. }

Bond on Removal.

Know all men by these presents:—That we the Saint Bernard Mining Company as principal and George C. Atkinson, and Paul M. Moore as sureties, residents, of the county of Hopkins, Commonwealth of Kentucky, are held and firmly bound unto the Madisonville Traction Company, plaintiff, in the above styled cause, its successors and assigns in the sum of five hundred dollars, lawful money of the United States of America, for the payment of which, well and truly to be made we and each of us bind ourselves and each of us, our successors heirs, executors and administrators, jointly and severally, by these presents.

The conditions of this obligation are such that whereas the said The Saint Bernard Mining Company has applied to the Hopkins

county court in and for Hopkins county, Kentucky for the removal of a certain cause therein pending wherein Madisonville Traction Company is plaintiff and The Saint Bernard Mining Company is defendant, to the circuit court of the United States, for the western district of Kentucky; Owensboro division, for further proceedings on grounds in said petition set forth and that all further proceedings in said Hopkins county court be stayed.

Now therefore, if your petitioner The Saint Bernard Mining Company shall enter in said United States circuit court for the western district of Kentucky, Owensboro division, aforesaid, on or before the first day of the next regular session a copy of the records in said suit, and shall pay or cause to be paid all costs that may be awarded therein by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to be and remain in full force and effect.

Given under our hands this the 28th day of October, A. D., 1903.

ST. BERNARD MINING CO., *Principal,*
By JNO. B. ATKINSON, *President.*
GEO. C. ATKINSON.
PAUL M. MOORE.

Signed subscribed and sworn to before me by John B. Atkinson, George C. Atkinson and Paul M. Moore on this the 28th day of October, 1903.

13–15

My commission expires on the 16 day of Feb., 1906.

[SEAL.] JESSE PHILLIPS,
Notary Public, Hopkins County, Kentucky.

COMMONWEALTH OF KENTUCKY, }
County of Hopkins, } ss:

George C. Atkinson, and Paul M. Moore, the sureties in the foregoing bond being of lawful age and first duly sworn each for himself deposes and says:

I am the same person whose name is subscribed to the foregoing bond, and I state that I am a householder and resident of the county and Commonwealth aforesaid, and that I am worth the sum of five hundred dollars named therein as the penalty thereof, over and above all my just debts and liabilities, exclusive of property which is exempt from execution.

GEO. C. ATKINSON.
PAUL M. MOORE.

Subscribed and sworn to before me by George C. Atkinson, and Paul M. Moore, by me personally known to be the same and creditable persons, on this the 28th day of October, A. D. 1903.

My commission as notary public expires on the 16th day of February, A. D. 1906.

Given under my hand as notary public in and for said county and Commonwealth on this the 28th day of October, A. D. 1903.

[SEAL.] JESSE PHILLIPS,
Notary Public, Hopkins County, Kentucky.

A copy.

Attest: JOHN B. BRASHER, *Clerk*,
By W. T. MILLS, *D. C.*

16 *Description of Property to be Acquired of the St. Bernard Mining Company.*

A strip of ground 50 feet and 30 feet in width, the center line of which is described as follows:—A strip 50 feet wide lying 25 feet on each side of the following described line, to-wit:

"Beginning on the north line of the land owned by the St. Bernard Mining Co., at a point 80 feet in a westerly direction from the center of the track of the Louisville & Nashville R. R. measured at right angles thereto; thence in a southerly direction along the arc of a circle parallel to and 80 feet from the center of said track 1400 feet more or less to a point where a straight line drawn tangent to this curve would cross the Y or siding at station 216 plus 15 feet at a point 20 feet west of the point of a switch measured along the center of the track; thence in a southerly direction along this last described tangent to the point of curve at station 217; thence curving to the left along the arc of a circle having for its radius 1432.69 feet, 120.44 feet and thence continuing in a southerly direction tangent to this curve 1264.59 feet to the center of the creek at station 230 plus 85 feet.

And a strip 30 feet wide lying 15 feet on each side of the following described line, to-wit: "Beginning at the center of the creek at station 230 plus 85 feet and extending in a southerly direction along the continuation of the last described line 115 feet to the point of a curve at station 232; thence curving to the left along the arc of a circle having for its radius 1432.69 feet a distance of 459.25 feet to a station 236 plus 59 26 feee; thence continuing in a southerly direction tangent to this curve and 30 feet east of and parallel to the fence between stations 236 plus 20 feet to and 241 feet for a distance of 717.22 feet to the point of curve at station 243 plus 76.48 feet and thence curving to the left along the arc of a circle having for its radius 125 feet, 85.55 feet to station 244 plus 62.03 feet continuing in a southerly direction tangent to this curve 293.45 feet and to the point of curve at station 247 plus 55.48 feet; thence curving to the right along the arc of a circle having for its raidus 125 feet, 85.55 feet to station 248 plus 41.03 feet and thence in a southerly direction tangent to this curve 234.97 feet to the north line of a strip

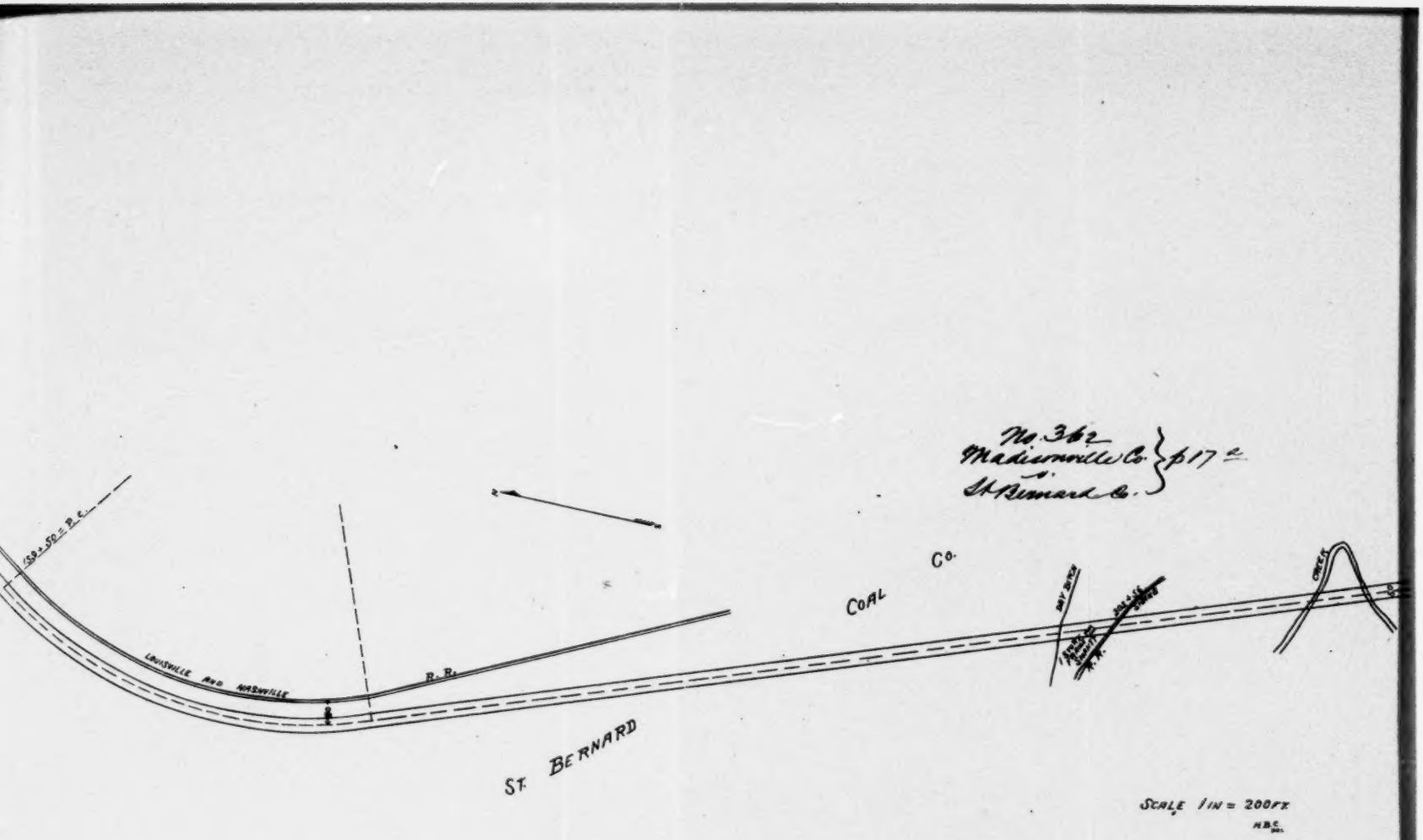
of ground known and used as Main avenue in the town of Earlington.

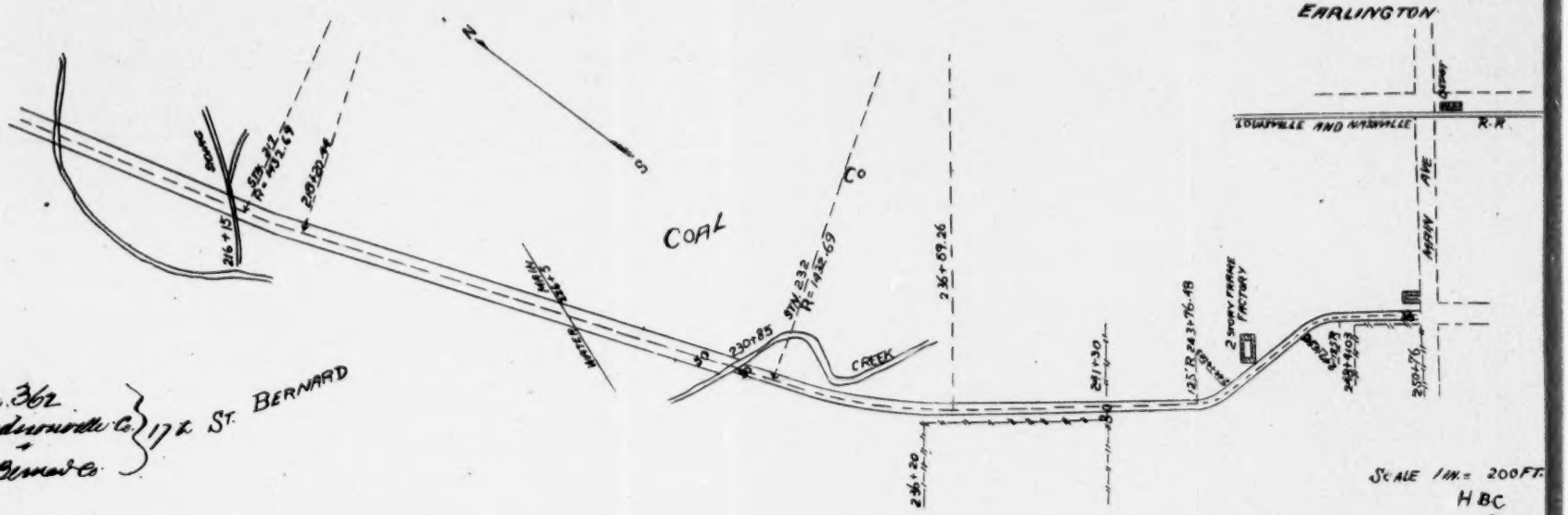
17 All of the above described land to be condemned and appropriated, has an area of 9.58 acres and is according to plat filed herewith and attached hereto.

A copy
Attest:

JOHN B. BRASHER, *Clerk*,
By W. R. MILLS, *D. C.*

(Here follow diagrams marked p. 17*a* and 17*b*.)


No 362
Madisonville Co.
St Bernard Co.
$17 a
Co.
COAL
LOUISVILLE AND NASHVILLE
R. R.
ST. BERNARD
SCALE 1 IN = 200 FT



No. 362
Madisonville Co } 17 & St. BERNARD
& St. Bernard Co.

SCALE 1 IN. = 200 FT.
H B C
Del.

18 Hopkins County Court.

MADISONVILLE TRACTION COMPANY, Plaintiff,
vs.
ST. BERNARD MINING COMPANY, Defendant.

Application to the County Court to Appoint Commissioners to Assess Damages to the Lands of the St. Bernard Mining Company.

The plaintiff, Madisonville Traction Company, states that it is a corporation created and existing under and by virtue of the laws of the Commonwealth of Kentucky, and that by virtue of its corporate capacity it is empowered and authorized to cons-*uct* and maintain a railroad running from Madisonville to Earlington, Hopkins county, Ky.

The plaintiff, Madisonville Traction Co. states that it is unable to contract with the defendant St. Bernard Mining Co., the owner of land necessary for its use as a right of way for t-e purpose of laying its tracks over and upon which it is necessary to operate its said line of railroad, that said land necessary for its use for the purpose of right of way, is embraced in a strip of ground thirty and fifty feet wide a particular description of which is filed in the office of the clerk of the county court, to which reference is made and asked to be made a part of this application, the same being marked "Description of property to be acquired of the St. Bernard Mining Co."

The plaintiff Madisonville Traction Co. says that by reason of the fact that it is unable to contract with the defendant St. Bernard Mining Co. for land necessary for its use as a right of way, therefore, same will have to be condemned, in order that it may enjoy its rights and privileges as guaranteed to it under the law.

Wherefore plaintiff prays that the court appoint three commissioners for the purpose of viewing the ground over and upon which said road is proposed to run, award defendants such damages as it must sustain by reason thereof and order them to report their action to the court in writing and for such relief as it may be entitled to.

RUBY LAFFOON,
Att'y for Madisonville Traction Co.

Copy

Attest:
JOHN B. BRASHER,
Clerk Hopkins County Court,
By W. T. MILLS, *D. C.*

19 Hopkins County Court, October Term, 1903.

Hon. W. D. STODGHILL, *P. J.*:

On this day came the Madinso-ville Traction Co. by its attorney and filed in the office of the clerk of the Hopkins county court a particular description of land which it seeks to condemn for the purpose of a right of way upon which to lay its tracks and operate an electric railroad which is proposed to run from Madisonville to Earlington in Hopkins county, and made application to this court to appoint three commissioners being house-keepers to view the land of the St. Bernard Mining Co. over which said railroad is proposed to run, the same being a strip of ground 30 and 50 feet wide and described as follows:—

Beginning on the north line of the land owned by the St. Bernard Mining Company at a point 80 feet in a westerly direction from the center of the track of the Louisville & Nashville R. R. measured at right angles theret- thence in a southerly direction along the arc of a circle parallel to and 80 feet from the center of said track 1400 feet more or less to a point where a straight line drawn tangent to this curve would cross the Y or siding at station 216 plus 15 feet, at a point 20 feet west of the point of switch measured along the center of the track; thence in a southerly direction along this last described tangent to the point of curve at station 217; thence curving to the left along the arc of a circle having for its radius 1432.69 feet, 120.44 feet thence continuing in a southerly direction *b* tangent to this curve 1264.56 feet to the center of the creek at station 230 plus 85 feet.

And a strip 30 feet wide lying 15 feet on each side of the following described line, to wit:—

Beginning at the center of the creek at station 230 plus 85 feet and extending in a southerly direction along a continuation of the last described line 115 feet to the point of curve at station 232; thence curving to the left along the arc of a circle having for its radius 1432.69 feet, a distance of 459.26 feet to station 236 plus 59.26 feet; thence continuing in a southerly direction tangent to this curve
30 feet east of and parallel to the fence between stations 236
20 plus 20 feet and 241 plus 30 feet for a distance of 717.22 feet to the point of curve at station 243 plus 76.48 feet and thence curving to the left along the arc of a circle having for its radius 125 feet, 85.55 feet to the station 244 plus 62.03 feet continuing in a southerly direction tangent to this curve 293.45 feet and to the point of curve at station 247 plus 55.48 feet thence curving to the right along the arc of a circle having for its radius 125 feet, 85.55 feet to station 248 plus 41.03 feet and thence in a southerly direction tangent to this curve 234.97 feet to the north line of a strip of ground known and used as Main avenue in the town of Earlington.

All of the above described land to be condemned and appropri-

ated has an area of 9.58 acres and is according to plat filed herewith and attached hereto.

And it appearing to the court that the law in such cases made and provided having been complied with, it is now ordered that A. Y. Kennedy W. E. Carlisle and W. P. Hopgood, three disinterested and impartial housekeepers of Hopkins county, be and they are appointed commissioners to view the land proposed to be condemned for the purpose of a right of way by the Madisonville Traction Company and they will report to this court on or before ten days previous to the regular November term thereof. It will be your duty to view the land and to award to the St. Bernard Mining Company the value of said land taken which shall be stated in your report; and you will also award the damage, if any, resulting to the adjacent land of the St. Bernard Mining Company, considering the purpose for which it was taken; but you shall deduct from such incidental damages the value, if any, of the advantages and benefits as will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed. You shall return a report in writing to the office of the clerk of the Hopkins county court stating your award and you shall describe in your report the land condemned, give the name- of the owners, and whether non-residents of the State, infants, of unsound mind, or married women, and this action is continued until your report is filed herein. Ordered that court adjourn.

W. D. STODGILL, *Judge.*

A copy.
Attest:

JOHN B. BRASHER,
Clerk Hopkins Count-, Ky., Court,
By R. W. MIFFLIN, *D. C.*

Executed by delivering a true copy of this summons to W. E. Carlisle, W. P. Hobgood and A. Y. Kennedy, Oct. the 10th. 1903.

W. E. ASHBY, *S.* —.

21 A copy
Attest:

JOHN B. BRASHER,
Clerk Hopkins County Court,
By W. T. MILLS.

Hopkins County Court.

MADISONVILLE TRACTION COMPANY, Plaintiff,
vs.
ST. BERNARD MINING COMPANY, Defendant.

Report of Commissioners Herein.

We, the undersigned, commissioners appointed by the county court to assess the damages the St. Bernard Mining Company, the owner

of the land may be entitled to receive by reason of its land being sought to be condemned for the purpose of a right of way for the Madiconsille Traction Company, over across and upon the lands of the said St. Bernard Mining Company, beg leave to make the following report:—

We, the undersigned commissioners, after having been duly sworn, to faithfully an- impartially discharge our duties under t-e law, did go upon and over the land of the said St. Bernard Mining Company, it being the owner thereof, and being the land sought to be condemned by the Madisonville Traction Company for its right of way, and being a strip of ground fifty feet wide from the north line of the land owned by the said St. Bernard Mining Company, at a point eighty feet in a westerly direction from the center of the tract of the Louisville and Nashville Railroad Company measured at right angles thereto, and running in a southerly direction along the arc of a circle parallel to and eighty feet from the center of said tract fourteen hundred feet more or less to a point where a straight line drawn tangent to this curve would cross the " Y " or siding of the St. Bernard Mining Company's switch, at a point twenty feet west of the point of the switch measured along the center of the track; thence in a southerly direction along this last described tangent to the point of a curve at station marked by a stake driven in the ground and numbered 217; thence curving to the left along the arc of a circle having for its radius 1432.69 feet, 120.44 feet, and thence continuing in a southerly direction tangent to this curve 1264.56 feet, to the venter of the creek at station 230 plus 85 feet.

And a strip of ground thirty feet wide lying fifteen feet on each side of the following described line, to wit:—

22 " Beginning at the center of the creek at station 230 plus 85 feet and extending in a southerly direction along the continuation of the last described line 115 feet to the point of curve at station No. 232, marked by a stake driven in the ground; thence curving to the left along the arc of a circle having for its radius 1432.69 feet, a distance of 429.26 feet to station 236 plus 59.26 feet, said station being marked by a stake *a stake* driven in the ground; thence continuing in a southerly direction tangent to this curve and thirty feet east of and parallel to the fence between stations 236 plus twenty feet and 241 plus thirty feet for a distance of 717.22 feet to the point of curve at station 243 plus 76.48 feet and thence curving to the left along the arc of a circle having for its radius 125 feet, 85.55 feet to station 244 plus 62.03 feet continuing in a southerly direction tangent to the curve 293.45 and to the point along the arc of a circle having for its radius 125 feet, 85.55 feet to station 248 plus 41.03 feet and thence in a southerly direction tangent to this curve 234.97 feet to the north line of a strip of ground known and used as Main avenue in the town of Earlington. The said line being distinctively marked from the beginning at the north edge of the St. Bernard Mining Company's land to its terminus at Main street in the town of Earlington by stakes or stobs driven in the ground

and consecutively numbered, the same being one hundred feet apart and being the same land particularly described by a statement filed in the office of the clerk of the Hopkins county court and drawing attached thereto. We further find that all the land over which the Madisonville Traction Company proposes to construct its right of way as shown in the description and drawing referred to herein is owned by the St. Bernard Mining Company, with the exception of a small lot of ground located near the north of the Hecla switch, which is owned by E. McLeod, further, that the St. Bernard Mining Company is a corporation created, organized and existing under and by virtue of the laws of the State of Delaware, being a non-resident of the State but with its principal place of business at Earlington, Hopkins county, Kentucky.

After having carefully viewed the ground or land sought to be condemned by the Madisonville Traction Company for the
23 purpose of a right of way over across and upon the land of the St. Bernard Mining Company as described therein, we hereby award to the St. Bernard Mining Company the owner of land aforesaid, the sum of one hundred dollars ($100.00) that being the value of the land taken for the purpose mentioned herein we do not award any sum in damages resulting to the adjacent lands of the St. Bernard Mining Company, the owner as aforesaid, considering the purpose for which said land is taken, but report thar the advantages and benefits that will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed will be largely in excess of any damages that will accrue, in fact, we do not believe any damages will result whatever. All of which is most respectfully submitted.

Given under our hands this the 16th day of October, 1903.

A. Y. KENNEDY.
W. P. HOBGOOD.
W. E. CARLISLE.

Commissioners' fees: —.
A. Y. KENNEDY.
W. P. HOBGOOD.
W. E. CARLISLE.

A copy.
Attes-:

JOHN B. BRASHER,
Clerk Hopkins County, Ky., Court,
By W. T. MILLS, *D. C.*

24 Upon which there issued the following process:

The President of the United States of America to the Madisonville Traction Company, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the western district of Kentucky, at the Federal Court hall in the city of Owensboro, on the first

Monday in February next, to answer a bill in equity exhibited against you in our said court, by Saint Bernard Mining Company, which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the [SEAL.] seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville this 2nd day of January, A. D., 1904, and in the 128th year of our Independence.

THOS. SPEED,
C. C. C., K. D.

MEMORANDUM.—The defendant is to enter its appearance in the suit in the clerk's office on or before the 1st day of February, next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso*.

THOS. SPEED, *Clerk.*

Upon which the marshal made the following return:

Received the within subpœna in ch'y January 2nd, 1904 and executed same January 5th, 1904 in Louisville Ky. on Madisonville Traction Company by delivering a true copy hereof to Joseph Huffaker, president of said company. This January 5th, 1904.

A. D. JAMES, *U. S. M.*,
By WM. BLADES, *D. M.*

25 And on another day of said court to wit on the 6th day of January 1904, came the complainant by Wm. L. Gordon, E. G. Sebree and Edmund F. Trabue its counsel, and filed a notice duly executed on the defendant and moved the court for an interlocutory injunction as prayed for in its bill of complaint herein.

This cause being argued by William L. Gordon, E. G. Sebree and Edmund F. Trabue for complainant and David W. Sanders and Hite Huffaker, for defendant and submitted on complainant's motion for an interlocutory injunction, and the court being advised, it is ordered by the court that the defendant, its officers, agents and employees, and each of them be and they are enjoin3d and restrained until the further order of the court from further prosecuting or causing to be prosecuted, the proceeding instituted by the defendant against complainant in the county court of Hopkins county, Kentucky, and from taking any steps, or causing any orders to be made therein, or taking any proceeding whatever therein, and from entering upon the land or any part thereof which the said defendant is in said proceeding attempting to condemn and appropriate.

And leave is given to complainant to apply to the court on the first day of its next session at Owensboro, Kentucky, being the

second day of May, 1904, for an extension of this interlocutory order of injunction, *pendente lite.*

The return on said injunction is as follows:—

Executed January 6th, 1904 on Madisonville Traction Company by delivering a true copy hereof to Joseph Huffaker, president of said company.

This January 7th, 1904.

A. D. JAMES, *U. S. M.*,
By WM. BLADES, *D. M.*

26 And on the 2nd day of May, 1904, came the complainant by Gordon, Gordon & Cox, and E. G. Sebree its counsel; came also the defendant by D. W. Fairleigh and H. H. Huffaker its counsel.

The complainant by counsel moved the court for an extension *pendent- lite* of the interlocutory order of injunction, entered herein January 6th, 1904, and the court not being advised thereof, takes time.

And on the same day to wit on the 2nd day of May, 1904, came the complainant by Gordon, Gordon & Cox, and E. G. Sebree, its counsel. Came also the defendant by David W. Fairleigh its counsel; the complainant by its said counsel filed the joint affidavit of Frank D. Rash, I. Bailey and W. L. Gordon, Jr., herein; came again the defendant by its said counsel, and filed its demurrer to the bill of complaint herein; this cause coming on to be heard upon said demurrer and having been argued by counsel and the court not being advised thereof, takes time.

27 The demurrer above referred to is as follows:

Circuit Court of the United States, Western District of Kentucky, Owensboro Division.

ST. BERNARD MINING COMPANY, Plaintiff,
vs.
MADISONVILLE TRACTION COMPANY, Defendant. } Demurrer to Bill.

The demurrer of Madisonville Traction Company, defendant, to the bill of complaint of The St. Bernard Mining Company, the above named complainant.

This defendant by protestation, not confessing or acknowledging all or any of the things and matters in the said comp-ainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth:

1. That the matters and things in the said bill of complaint stated and averred are not sufficient in law to constitute a cause of

action against this defendant, and are not sufficient to authorize the court to grant to the said complainant the relief or any part thereof which is prayed for in the bill.

2. The court is without jurisdiction or power and is not authorized under the Constitution and laws of the United States to grant the injunction prayed for in the bill or to grant any other or like relief.

Wherefore and for divers other errors and imperfections appearing in the said bill, this defendant humbly prays the judgment of this honorable court whether it shall be compelled to make any answer to said bill.

H. H. HUFFAKER,
FAIRLEIGH, STRAUS & FAIRLEIGH,
Counsel for Defendant.

David W. Fairleigh says that he is counsel for the defendant and the foregoing demurrer is in his opinion well founded in point of law.

DAVID W. FAIRLEIGH.

Joseph Huffaker says he is president of the defendant The Madisonville Traction Company, and the foregoing demurrer is not filed or interposed for delay.

JOSEPH HUFFAKER.

Subscribed and sworn to by Joseph Huffaker before me this 29th day of April, 1904. My commission expires Feb. 12, 1906.

[SEAL.] H. H. HUFFAKER,
Notary Public, Jefferson Co., Kentucky.

28 And on the 27th day of May, 1904, the following order was entered :

The court being now fully advised of the defendant's demurrer to the complainant's bill of complaint herein, and of the complainant's motion for an extension of the interlocutory order of injunction *pendente lite* heretofore entered herein, delivered an opinion in writing, which is ordered to be filed and made part of the record, and in accordance therewith it is ordered, adjudged and decreed by the court that said demurrer be and the same is hereby overruled.

It is further ordered adjudged and decreed by the court that an injunction *pendente lite* issue enjoining the defendant, its officers, agents and employees and each of them from further prosecuting or causing to be prosecuted the proceeding instituted by the defendant against the complainant in the county court of Hopkins county, Kentucky, and from taking any steps or causing any orders to be made therein, or taking any proceeding whatever therein and from entering upon the land or any part thereof, which the said defendant is in said proceeding attempting to condemn and appropriate.

It is further ordered adjudged and decreed by the court that said

injunction shall not issue until complainant shall execute to the defendant with good security to be approved by the court, a bond in the penal sum of one thousand dollars, conditioned that the said complainant will pay to the said defendant any damages that it may sustain by reason of the issuing of said injunction if it be finally determined that said injunction ought not to have been granted.

Bond omitted by consent of parties.

29 The opinion above referred to is as follows:

United States Circuit Court, Western District of Kentucky, at Owensboro.

ST. BERNARD MINING COMPANY, Plaintiff,
vs.
THE MADISONVILLE TRACTION COMPANY, Defendant.

Opinion.

The defendant, a citizen of Kentucky, having instituted a proceeding in the Hopkins county court, to condemn to its own uses certain real estate belonging to the complainant, a citizen of Delaware, the latter removed that proceeding to this court. Subsequently it filed its bill of complaint stating the grounds upon which it asked the court, in aid of its jurisdiction in the other proceeding and to prevent irreparable injury to the complainant to enjoin the defendant from further proceedings in the State court. The defendant demurred to the bill.

In view of the peculiarities of that litigation and the great inconvenience that might otherwise result, the court originally granted the temporary restraining order against the traction company for those reasons and upon the idea that the case for the condemnation of the land was certainly removable and that it certainly had been removed. Those reasons still apply with undiminished force.

When the proper steps for removal have been taken the statute—the supreme law of the land, binding upon all courts, State and Federal alike—expressly enjoins that the State court shall proceed no further in the cause. The court in its opinion this day delivered upon the motion to remand the condemnation suit, has, as it os believe l, shown that it now has jurisdiction of that case. This being so, the power of the court to grant the injunction, if, on the facts, it becomes advisable, seems clear under the authorities, for, notwithstanding the provisions of section 720, the courts hold that in removal cases they may, where it seems necessary to the ends of justice, protect their jurisdiction by enjoining the plaintiff from proceeding further

30 with the action in the State court. This is in part upon the ground that by the removal the State court has been deprived of jurisdiction, and that thereafter the Federal court alone has it. French *vs.* Hay, 22 Wallace, 253; Moran *vs.* Sturges 154 U. S. 269,

270; Black's Dillon on Removal of Causes, section 194, and the numerous cases cited; Dietzsch *vs.* Huidekoper 103 U. S. 494, and its attendant case Kern *vs.* Huidekoper 103 U. S. 483; Abeel *vs.* Culberson 56 Fed. 329, Wagner *vs.* Drake, 31 Fed. 849; B. & O. R. R. Co. *vs.* Ford, 35 Fed. 170; Frishman *vs.* Insurance Co. 41 Fed. 449; Terre Haute &c., R. R. Co. *vs.* Peoria &c. R. R. Co. 82 Fed. 943. In the last of these cases at page 946, Judge Grosscup said:

"The removal statutes have in substance from the original judiciary act to the present time, provided that any suit of a civil nature at law or in equity, of which the circuit courts of the United States are given jurisdiction, shall be removable. It seems plain that if the Federal court cannot protect its jurisdiction by restraining all proceedings in the State court destructive thereof, the whole case is not, in fact removed. Indeed had not the right of such injunction upon State proceedings been sustained in Dietzsch *v.* Huidekoper, the Federal court would by the removal, have obtained nothing but the shell of the case, while its substance—the real power affecting the interests of the parties—would have remained in the State court.

"These statutes, conferring jurisdiction in all cases arising in law or in equity, where certain conditions exist, were not intended to confer merely fractional jurisdiction. The right of the Federal court to take cognizance of the controversies arising in such cases, with all the remedies usually applied to law and in equity, was clearly contemplated. Section 720 could never have been intended to trench upon this grant of jurisdictional domain. Such interpretation would imply an intention on the part of Congress to repeal a portion of the power expressly given to the courts both by the Constitution and the judiciary act. In their literal scope, the Constitution and statutes conferring jurisdiction, and this section 720, are in conflict, and to the extent of such conflict the legal effect of the latter statute must be narrowed down. The cases cited, and a line of cases in the Supreme Court of the United States, of which they are a development,
31 clearly show that this is the interpretation put upon these two apparently inconsistent lines of legislation."

The demurrer to the bill is accordingly overruled, and, as it seems necessary to the ends of justice, the motion of the mining company for the injunction *pendente lite*, will be sustained. A copy of the opinion referred to is annexed to this opinion as a part thereof, and with it will be filed as part of the record in the case.

United States Circuit Court, Western District of Kentucky, at Owensboro.

THE MADISONVILLE TRACTION COMPANY, Plaintiff,
vs.
THE ST. BERNARD MINING COMPANY, Defendant.

Copy of Opinion.

This is a proceeding under the Kentucky statutes instituted in the county court of Hopkins county by The Madisonville Traction Company a citizen of Kentucky, against The St. Bernard Mining Company, a citizen of Delaware, for the condemnation of certain lands in that county belonging to the mining company for the uses of the traction company. Without notice to the mining company the county court appointed commissioners who valued the land said by the traction company to be needed for its uses, and returned their report to the county court. Upon its being filed, process was served upon the mining company. Thereupon, and in due season, it removed the case to this court. The traction company has moved to remand it to the State court and urges that step upon grounds which will be developed in the course of what is about to be said.

If the Commonwealth of Kentucky by a similar proceeding were seeking to condemn for its own public purposes the land of the St. Bernard Mining Company, say for a court-house or a jail, no doubt could arise upon the question of whether the proceeding could be removed from the State court to this court. It could not be removed for one all-sufficient reason which would meet the attempt at the threshold; namely there would be no adverse citizenship, inasmuch as the State, for jurisdictional purposes, is not to be treated
32 as a citizen, within the meaning of that term as used in the judiciary act. Postal Telegraph Co. *vs.* Alabama, 155 U. S. 487. But here the Commonwealth of Kentucky is not a party to the litigation, either actually or formally. The Madisonville Traction Company alone is the party, the litigant, the actor. It is true that this company is using power conferred by State laws, but so also do all litigants who come into the courts of the State to enforce rights conferred by its laws, written or unwritten. The traction company, a citizen of Kentucky, being the sole litigant, the sole actor, on one side, and the mining company, a citizen of Delaware, being the sole litigant and respondent, on the other, the contestation is between those two citizens alone, and the amount in controversy being shown to exceed $2000 exclusive of interest and cost, the other question is whether this proceeding is a "suit of a civil nature" and one of which this court might have had jurisdiction if it had been brought here in the first instance. That it is a suit of a civil nature admits of no doubt. Kohl *vs.* United States 91 U. S. 367; Boom Co. *vs.* Patterson, 96 U. S. 406; Searl *vs.* School District 124

U. S. 199; Union Terminal Co. *vs.* Chicago &c. Ry. Co., 119 Fed. 209; Kirby *vs.* Chicago &c. Ry. Co. 106 Fed. 551.

It seems to me also inasmuch as there was in each one of those cases, except the first named, a removal which was sustained although the proceeding was to condemn land by a corporation, that they, at least inferentially, establish the distinction already noticed, that while proceedings for that purpose by the State itself could not be removed, yet that the same reasons do not by any means apply to cases where corporations use the power given to them by the legislature to condemn to their own uses lands which belong to another. The argument of the learned counsel for the traction company is ingenious and plausible but I think overlooks the distinction referred to.

It seems to the court, after a careful examination of them, that there is nothing in the actual decisions of the court in Boom Co. *vs.* Patterson 98 U. S. 404 Searles *vs.* School District, 124 U. S. 197, and Mexican &c. R. R. *vs.* Davidson, 157 U. S. 200 which at all conflicts with the view just expressed, although those cases are greatly relied on by counsel.

So much of the judiciary act of 1887–8 as is applicable to the point we are discussing is in this language:

33 "SEC. 1. That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and * * * in which there shall be a controversy between citizens of different States in which the matter exceeds, exclusive of interest and costs, the sum or value aforesaid * * * But * * * no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

"SEC. 2. That any suit of a civil nature at law or in equity * * * of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district, by the defendant or defendants therein, *being non residents of that State.*" (1 Compiled Stats. 1901, 508–9)

It may at this point be observed that the last words in section 2 which I have quoted and italicized have been construed to be equivalent to the words "not being citizens of that State." Martin *vs.* B. & O. R. R. Co., 151 U. S. 676–7. And it may also be remarked that it has been conclusively settled that in suits of a civil nature the *jurisdiction* given by the statute depends alone upon the diverse citizenship of the parties and the amount in controversy, while those parts of the

statute which relate to "inhabitancy" and "residence" are matters which affect the personal privilege of venue only and not *jurisdiction* as such. McCormick & Co. *vs.* Walthers, 134 U. S. 41; Shaw *vs.* Quincy Mining Co., 145 U. S. 448; Martin *vs.* B. & O. R. R. Co., 151 U. S. 676 *In re* Keasby & Mattison Co. 160 U. S. 229; Simonton in Empire &c. Co. *vs.* Propeller &c. Co. 108 Fed. 900, and Whitworth, *vs.* Ill. Cent. R. R. Co., 107 Fed. 557.

In its opinion in Mexican Nat'l R. R. Co. *vs.* Davidson 157 U. S. at the bottom of page 208, the court in speaking of the provisions of the act of 1887-8 says:

34 "Section 2, however, refers to the first part of section one by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought."

It may not be amiss to remark that these cases in no wise appear to conflict with the case of Tennessee *vs.* Union & Planters Bank, 152 U. S. 454, much relied on by counsel. The syllabus in that case very accurately expresses the exact point of that decision.

But it seems quite unnecessary to pursue further this phase of the subject, and we proceed to the consideration of the proposition most pressed in behalf of the traction company, which, stated generally, is that the case is not removable at all as to that part of it which seeks to condemn the land, though it is admitted that that part of the case involving the mere ascertainment of compensation may possibly be so. In other words, it seems to amount to this, that the basic controversy, viz., that involved in the claim to the land, cannot be removed because that is to be settled by the exercise of the right of eminent domain, but that its inevitable incident —the ascertainment of compensation—possibly may be removed.

In disposing of this contention, I think we may assume at all events that we have here a suit of a civil nature, the parties to which are citizens of different States, and that there is a matter in controversy which exceeds in amount $2,000 exclusive of interest and costs. Of such a suit this court would undoubtedly have had original jurisdiction even if it were a condemnation proceeding. It would come literally within the express language of the statute Where those three jurisdictional prerequisites coexist, either party, under section one of the act, may bring its suit in this court, and this would be so whether the suit were to enforce a mortgage, a note, a trust or any right created by a statute of the State. The fact that it is exceedingly seldom that such a proceeding as this is instituted in the Federal courts does not make it impossible or unlawful for it to be done. On the contrary, the rule, with a few exceptions not pertinent here, is established by an unbroken line of authorities that where a State statute gives any remedy which is available in a State court it is also available, if other jurisdic-

35 tional requisites are present, in the Federal courts, although those courts are not mentioned in the statute. This is said to be axiomatic in Federal jurisprudence. *Ex parte* McNeil, 13 Wall. 243, and many subsequent cases. So that in the proper sense this

court would have had jurisdiction of this action if it had been originally brought here by the traction company. Union Terminal Co. *vs.* Chicago &c. R. R. Co. 119 Fed. 209. If the proceeding had been instituted here this court would have been bound to give to the traction company the exact relief which it would be entitled to under the State law—no more, no less. It must be presumed that it will do so now. So that it is only a question of the right of the respondent to choose the tribunal to try the case. This right is given by the supreme law of the land.

When this case was first brought to my attention upon a motion for a temporary restraining order made in a suit in which that relief was sought, the question of the court's jurisdiction in this proceeding necessarily suggested itself and was somewhat considered. The cases above referred to, or most of them, were then examined.

Now a distinction is urged by the learned counsel for the plaintiff to the effect that this case only involves questions concerning the assessment of damages and must be limited to that phase of it in this court, but even if this be true it cannot affect the motion to remand, which would have to be overruled, if, upon any ground, the case is properly here. They insist that the preliminary proceedings in the county court, of which the mining company had no notice until after the report was filed, exerteed, beyond recall, the power of eminent domain, condemned the land to the uses of the traction company and vested in it all the owner's title thereto. While possibly, it may be premature to pass upon this question, I cannot refrain from now saying that it seems to me that this proposition is wholly unmaintainable. As the contention points out, it would leave nothing to be done here except to consider the mere reassessment of values and compensation. It assumes that the mere condemnation part of the case was finally concluded when the process on the commissioners' report was issued and served, and could not be affected by a hearing before the court, an opportunity for which was supposed to be afforded by the service of process. In short
36 it assumes that the most important part of the case ended before the service of process, leaving only remnants of the controversy to be wound up thereafter. While it is ably urged, the court finds itself unable to yield to the contention. It would require the anomalous conclusion that the principal object of the litigation was achieved before the suit was begun. The litigation—the suit—against the mining company was begun when the process was first issued, and that company then for the first time was tendered a day in court. Not till then did a controversy arise or begin. Then a suit of a civil nature was commenced. (Civil Code of Practice section 39) The object of that suit was to take from the mining company its property and confer title thereto upon the traction company, the latter first paying therefor just compensation. This required a judicial proceeding but only one, not two. Counsel would have the court divide this suit into two separate and distinct parts, treating one of those parts; namely, the controversy respecting the title to

the land as having been finally and conclusively settled by the preliminary proceeding taken in the county court, without notice to the owner and therefore as not being removable, and the other part; namely, that which involves the settlement of the compensation only as still being open and removable. But it seems to me that this division would be wholly artificial, not to say arbitrary, and without any warrant in law. The mining company, the owner of the land, has the right to litigate in the courts, the right of the traction company to take its land at all, as well as the right to compensation therefor. The chief object the traction company has in view is the acquirement of the land and that is the principal element of the litigation. Its interest in the other matter is quite secondary and incidental and it follows that if anything is removable it is the entire suit, in all its parts, root and branch. In any event, and even if the distinction drawn by the counsel is well conceived, the case was well removed as to the question of compensation and the motion to remand cannot prevail.

It seems to me that the motion should be overruled, and it is accordon-ly so ordered.

37 And on the 4th day of July, 1904, on motion of the defendant The Madisonville Traction Company by Messrs. Fairleigh, Straus & Fairleigh, its counsel, it is ordered that this cause be and the same is hereby submitted.

38 And on the 26th day of July, 1904, the following decree was entered:

The defendant's demurrer to the bill herein having been heretofore considered and overruled, and the said defendant standing by its demurrer and declining to answer the bill, set this cause at rules for final hearing upon the bill, and this cause having been submitted and coming on now finally to be heard, there was read on the hearing the bill of complaint, the defendant's demurrer thereto, the court's order overruling the same, the order of injunction *pendente lite*, and the transcript of the proceedings in the Hopkins county court filed by the complainant in this court, and which is referred to in the bill, and therein asked to be read, and the court being now sufficiently advised, finds that it has jurisdiction of the cause and that the equity of the case is with the complainant, The Saint Bernard Mining Company as against the said defendant, The Madisonville Traction Company, and that the said complainant is entitled to some relief against said defendant;

It is therefore accordingly ordered, adjudged and decreed by the court that the defendant Madisonville Traction Company its officers, agents and employés and each of them, be and they are perpetually enjoined and restrained from further prosecuting or causing to be prosecuted in the Hopkins county court, the proceeding described in the bill of complaint, and which was instituted by the said defendant against the said complainant in the Hopkins county court, and from taking any steps therein, in said county court, or causing any

orders to be made by said county court in said proceeding or taking any proceeding whatever therein in said county court, and from entering upon the land described in said proceeding or any part thereof, under any order of said county court in said proceeding. It is further ordered, adjudged and decreed that the complainant Saint Bernard Mining Company, recover of the defendant Madisonville Traction Company — objected and excepted.

The court certifies and states that one issue considered and adjudged upon the demurrer to the bill of complaint and upon the final hearing of the cause, was whether the court had jurisdiction of this action or to grant the relief prayed for, by the complainant or any part of it. The court held that it had jurisdiction to grant the relief herein adjudged and the question of jurisdiction alone
39 is now certified under the act of Congress to the Supreme Court of the United States for decision.

The defendant, Madisonville Traction Company thereupon filed its petition for an appeal to the United States Supreme Court, and also its assignment of errors, and it is ordered that said appeal be and it is granted and allowed, and the amount of bond on said appeal is fixed at $500.00 and thereupon the said defendant filed its bond in due form as required by law with the Fidelity and Deposit Company of Maryland, as surety, which bond is approved.

40 The petition for appeal above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit, Western District of Kentucky, Owensboro Division.

SAINT BERNARD MINING COMPANY, Complainant,
vs.
MADISONVILLE TRACTION COMPANY, Defendant.

Petition for Order Allowing Appeal.

To the Honorable Walter Evans, district judge of the United States for the western district of Kentucky, and one of the judges of the above named court, presiding therein:

The above named defendant, The Madisonville Traction Company, conceiving itself aggrieved by the final order and decree made and entered in the above named court in the above entitled cause, wherein and whereby among other things, the injunction granted *pendente lite* was made perpetual and wherein and whereby it was perpetually enjoined and restrained from further prosecuting or causing to be prosecuted the proceeding instituted by it (the said defendant) against The Saint Bernard Mining Company, the said complainant in the county court of Hopkins county, and from taking any steps or causing any orders to be made therein, or taking any proceeding whatever therein, and from entering upon the land, or any part thereof, which the said defendant is in said proceeding attempt-

ing to condemn and appropriate, does hereby appeal from said final order and decree to the United States Supreme Court for the reasons set forth in the assignment of errors which is filed herewith; and it prays that this its petition for said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said final order and decree was made, duly authenticated may be sent to the United States Supreme Court.

H. H. HUFFAKER,
FAIRLEIGH, STRAUS & FAIRLEIGH,
Counsel for Defendant.

41 The assignment of errors above referred to is as follows:—

Circuit Court of the United States for the Sixth Circuit, Western District of Kentucky, Owensboro Division.

SAINT BERNARD MINING COMPANY, Complainant,
vs.
MADISONVILLE TRACTION COMPANY, Defendant.

Assignment of Errors.

Comes now the defendant Madisonville Traction Company, and files the following assignment of errors:—

1. That the United States circuit court, in and for the sixth circuit, western district of Kentucky, Owensboro division, erred in overruling the demurrer interposed by the defendant to the bill of complaint filed in said cause.

2. The said court erred in granting the preliminary order of injunction and in extending said injunction *pendente lite*.

3. The said court erred in making said injunction granted *pendente lite*, perpetual, and erred in perpetually enjoining and restraining the defendant from further prosecuting or causing to be prosecuted the proceeding instituted by said defendant against the said complainant in the county court of Hopkins county, and from taking any steps or causing any orders to be made therein, or taking any proceeding whatever therein, and from entering upon the lands, or any part thereof, which the said defendant is in said proceeding attempting to condemn and appropriate, and the said court erred in granting and in making perpetual any injunction whatever against the defendant.

4. The said court erred in failing and refusing to dismiss the complainant's bill of complaint.

5. The said court erred in holding and adjudging that the proceeding instituted by the defendant Madisonville Traction Company against the comp-ainant Saint Bernard Mining Company, in the Hopkins county Kentucky court, was or is transferrable to the United States circuit court, and erred in holding that the United States circuit court, had and has jurisdiction of said proceeding.

6. The said court erred in holding and adjudging that it
42 had or has any jurisdiction whatever to make or grant any injunction against the said defendant.

Wherefore, the said defendant, Madisonville Traction Company, prays that the said judgment of said court be reversed and that the said court be directed to dismiss absolutely the said bill of complaint.

H. HUFFAKER,
FAIRLEIGH, STRAUS & FAIRLEIGH,
Counsel for Defendant.

43 The bond above referred to is as follows:

Circuit Court of the United States, Western District of Kentucky, Owensboro Division.

SAINT BERNARD MINING COMPANY
vs.
MADISONVILLE TRACTION COMPANY.

Know all men by these presents, that we, the Madisonville Traction Company as principal and the Fidelity & Deposit Company of Maryland, are held and firmly bound unto Saint Bernard Mining Company, in the sum of five hundred dollars, to be paid to the said Saint Bernard Mining Company executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us jointly and severally, and our, and each of our, heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 26th day of July, A. D., 1904.

Whereas the above named Madisonville Traction Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit, by the circuit court of the United States, for the western district of Kentucky, at Owensboro.

Now therefore, the condition of this obligation is such that if the above named Madisonville Traction Company shall prosecute its said appeal to effect, and answer all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MADISONVILLE TRACTION CO.,
By JOSEPH HUFFAKER, *President.* [L. S.]
[SEAL.] FIDELITY & DEPOSIT CO. OF MD.,
By WILLIS S. MULLEN,
Gen. Ag't & Att'y in Fact. [L. S.]

Sealed and delivered in presence of
HENRY F. CASSIN,
Deputy Clerk, U. S. Courts.

Approved July 26th, 1904,
WALTER EVANS, *Judge.*

44 WESTERN DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States, for the western district of Kentucky, at Owensboro do hereby certify that the foregoing 43 pages contain a true and correct transcript of the record and proceedings in the case of The Saint Bernard Mining Company *vs.* The Madisonville Traction Company No. 146 as the same appears from the files and records in my said office.

Witness my hand and seal of said court this 26th day of August, 1904.

[Seal 6th Circuit Court, Wes. Dis. Ky., U. S. of America.]

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

45 UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, Owensboro Division, } *ss:*

To The Saint Bernard Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, D. C., on the* 5th day of September next, pursuant to an appeal allowed by the circuit court of the United States for the western district of Kentucky, Owensboro division wherein The Madisonville Traction Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal 6th Circuit Court, Wes. Dis. Ky., U. S. of America.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 20th day of August, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America the one hundred and twenty ninth.

WALTER EVANS, *Judge.*

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* Not exceeding 30 days from the day of signing.

Filed August 23rd, 1904.

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

46 I hereby accept service of the within citation.
August 23rd, 1904.

E. G. SEBREE,
Counsel for Appellee.

Endorsed on cover: File No. 19,462. W. Kentucky C. C. U. S. Term No. 362. The Madisonville Traction Company, appellant, *vs* The Saint Bernard Mining Company. Filed September 1st, 1904 File No. 19,462.